NOTES OF CASES.

Powell *v.* Hemsley.

Court of Appeal. Cozens-Hardy, M.R., Farwell, L.J., Kennedy, L.J., June 14.

Covenant—Building Estate—Restrictive Covenant by Purchaser—Breach by His Lessee—Continuing Breach—Liability of Covenantor for Breach by Assign.—Appeal from a decision of Eve, J. (reported 78 Law J. Rep. Chanc. 337; L. R. (1909) 1 Chanc. 680).

In 1904 the defendant purchased part of a building estate and covenanted for himself, his executors, administrators, and assigns "that he will erect on the piece of land hereby assigned no buildings other than private residences with suitable out-buildings" at the rear thereof, and also "that he will, before the commencement of the erection of any building, submit the plans thereof" to the vendor, his heirs, and assigns for his or their approval. In 1906 the defendant granted a building lease subject to the covenants entered into by the defendant. The lessees commenced to erect buildings not in accordance with the covenant and without submitting plans to the vendor, and shortly afterwards became bankrupt. The trustee in bankruptcy disclaimed the lease, and the defendant had since been in possession. The plaintiff, who had purchased an adjoining part of the estate in 1907, with the benefit of the covenants contained in the conveyance to the defendant, alleged that the buildings, which were unfinished and in a derelict condition, depreciated the value of his property, and were erected in breach of the defendant's covenants, and he brought this action for a mandatory order on the defendant to pull down the buildings.

Eve, J., held (1) that the covenant was broken once and for all when the building was erected contrary to it, and therefore the defendant could not be liable on the footing of a continuing breach; (2) that the defendant had done nothing to encourage or promote the breach so as to render him liable for the violation of the contract; and (3) that the covenant did not impose on the covenantor any liability for the acts of his assigns, and accordingly he dismissed the action.

The plaintiff appealed.

P. O. Lawrence, K. C., and Dighton Pollock for the appellant.

A. H. Jessel, K. C., and G. N. Marcy for the respondent.

Their Lordships affirmed the decision of Eve, J.

Appeal dismissed.

This very important and interesting case is reviewed as follows in the editorial column of the "London Law Journal":

The recent case of Powell *v.* Hemsley, in which the Court of Appeal upheld the decision of Mr. Justice Eve, shows how extremely difficult it is to frame a restrictive covenant relating to a building estate so as to cover even reasonably probable contingencies. Lenton

Hall Estate, Nottingham, was being laid out as a building estate, and in June, 1904, part of the vacant land was conveyed in fee to the defendant, who covenanted "for himself, his executors, administrators, and assigns" with his vendor, "his heirs, executors, administrators, and assigns," not to erect houses of other than a certain class to be approved by the vendor. In November, 1904, Lenton Hall itself was conveyed away by the vendor. In 1906 the defendant granted a building lease of part of his land to two builders, who forthwith proceeded to erect houses not approved by the original vendor and in breach of the restrictive covenant. The builders then became bankrupt, and the trustee in bankruptcy disclaimed the lease granted by the defendant. Subsequently, in 1907, Lenton Hall was conveyed to the plaintiff, together with the benefit of all covenants entered into by purchasers of the Lenton Hall Estate. The plaintiff then brought the present action to restrain the defendant from erecting the houses and for an order directing him to pull them down. At first blush the plaintiff's claim seems reasonable enough. He was an assign of the original vendor, the houses had been erected in breach of the covenant and by an assign of the defendant, and the defendant was now the owner and in possession of the land on which the houses stood. The plaintiff, however, failed to substantiate his claim, and was held to be entitled to no relief against the defendant either at law or in equity. The merits of the defendant were considerable, inasmuch as he was not in the least degree responsible either for the breach of covenant or for the disclaimer of the lease. The Court of Appeal assumed, in favour of the plaintiff, that the words "he would erect" meant "the covenantor himself, his executors, administrators, and assigns would erect," but held that the case was not covered by the covenant as events had fallen out. The restrictive covenant had been broken once for all before Lenton Hall was conveyed to the plaintiff, and there had been no continuing breach; the conveyance to the plaintiff, though giving him the benefit of the defendant's covenants, did not purport to be an assignment of any right to damages for past breaches. The case is, as the Master of the Rolls said, "undoubtedly a curious one," and should lead conveyancers to scan with some care their common forms of restrictive covenants relating to building estates. The bankruptcy of builders is not, after all, such a very rare event, and the right to take advantage of past breaches of covenant can, and should, be conferred by apt words where land is purchased which is in process of development.

Ship—Charter-Party—Demurrage Payable Day by Day—Lien for Demurrage.—Rederiactieselskabet "Superior" *v.* Dewar (1909) 1 K. B. 948. This case is chiefly remarkable for the plaintiff's name; the legal points decided by Bray, J., are (1) that where a charter-party provides that demurrage shall be payable at a specified rate "day by day" and